
CHICAGO BAR
ASSOCIATION

Abstract

40 1 A 18

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10408 Agenda No. 1

In the Matter of the Dependency of Leslie Finch, a minor.	)	
# # #	)	
People of the State of Illinois and Mary Baldwin,	)	Error to the County Court of Sangamon County
Petitioners-Plaintiffs in Error,	)	
vs.	)	
Judith Finch,	)	
Defendant-Plaintiff in Error,	)	
and	)	
Jasper S. Gullo,	)	
Defendant-Defendant in Error.	)	

ROETH, Justice.

This case is before the court by writ of error to review an order of the County Court of Sangamon County finding Leslie Finch a dependent child and appointing a Guardian for her with right to consent to adoption, under the Family Court Act, and an order of the County Court denying a motion by Judith Finch, the mother of Leslie Finch, to vacate the dependency order. The writ of error

is sued out by Judith Finch and joined in by the People of the State of Illinois through the State's Attorney of Sangamon County. Jasper S. Gullo is named as defendant in error. The contention of plaintiffs in error is that the court lacked jurisdiction, as shown on the face of the record, to enter the dependency order or in any event, as shown by testimony adduced upon the hearing of the motion to vacate the dependency order.

The right of the People of the State of Illinois to join in the writ of error is rather questionable. The rule is that upon the filing of a dependency petition the People become the real party complainant and must prosecute the proceedings. People v. Piccolo, 275 Ill. 453, 114 N.E. 145. Nothing appearing in the record before us to the contrary, we must presume that such was done in the case at bar. The People therefore, are in the anomalous position of appealing from an order, the entry of which they secured. However, in any event, we are required to examine the record in this case in view of the fact that Judith Finch is properly a plaintiff in error.

Since the question of jurisdiction is involved, we think it apropos to note at the outset, that this court is fully aware that a proceeding to declare a minor child dependent is statutory and the record must show that all the requirements of the statute

have been complied with in order to give the court jurisdiction to enter final judgment. People v. McDonald, 225 Ill. App. 447. We first examine the record in the light of the contention that the record shows upon its face that the court lacked jurisdiction to enter the dependency order.

The Family Court Act (Ill. Rev. Stat. 1959, Chap. 23, Par. 2001 et seq) defines a dependent or neglected child as one who (among other things) does not have proper parental care or guardianship. It then provides (Par. 2002) that Circuit and County Courts shall have original jurisdiction of cases coming under the Act. Par. 2006 provides that any reputable person, being a resident of the county, "may file * * * a petition in writing setting forth that a certain child, naming it, within his county * * * is either * * * neglected or dependent". (Emphasis supplied). Par. 2006 then provides for the form of the petition to be filed and for issuance of process on the parties named in said petition. Par. 2026 authorizes the inclusion in the petition of a prayer that the guardian to be appointed, be authorized to consent to adoption under certain circumstances, one being that if the surviving parent of a legitimate child or the mother of an illegitimate child, consents to such an order.

The petition filed in the County Court in the case at bar alleges that Leslie Finch is without proper parental care or

guardianship; that said child is in the custody or control of Jasper S. Gullo, Springfield, Illinois; that the sole surviving legal parent and mother of the child is Judith Finch; that the mother consents that said child be taken away from her and placed under guardianship; that the mother is unable and unwilling to care for, protect, train, educate, control and discipline said child by reason whereof said child is dependent or neglected; that it is for the best interest of said child and the People of the State of Illinois that she be placed under guardianship; that said mother is not able to contribute to the support of said child; and that the mother consents in writing to the entry of a decree appointing a guardian for said child and authorizing the guardian to consent to legal adoption without notice or assent by said mother. The petition then prays that a hearing be had; that Judith Finch and the named person having custody or control of the child be made parties defendant; that they be required to appear with the child on the date of hearing; that a guardian be appointed; and that the guardian so appointed be authorized to consent to adoption of the child. This petition is signed and sworn to by Mary Baldwin, Probation Officer, under date of June 8, 1961. On June 8, 1961, the Judge of the County Court, Family Court Division, by written order, set the petition for hearing on June 13, 1961. Also on June 8, 1961, a written temporary

decree was entered by the same County Judge, appointing Charles F. Martin, Chief Probation Officer, as guardian of the minor child and authorizing him to take custody of the child and place her in any private home, private institution or child placing agency until further order of court.

The record before us also reflects that on June 8, 1961, Judith Finch signed a printed form which is captioned "In the Matter of Leslie Finch, alleged to be a dependent child" and which bears the legend in bold capital type at the commencement thereof "Entry of Appearance and Consent to Adoption". By this instrument she waived service of process and entered her appearance on the dependency hearing; consented to the granting of the prayer of the petition; released her right to custody or guardianship of the minor; and consented to the adoption of the minor child and the appointment of a guardian with right to consent to adoption without further notice. This instrument is signed by Judith Finch and her signature is witnessed by Mary Baldwin, Probation Officer. There is also attached the acknowledgement of the witness signed and subscribed to by Mary Baldwin. The record also reflects that the individual alleged in the petition to have custody or control of the minor was served with summons.

The dependency petition was heard on June 21, 1961. A dependency order was entered on that date appointing Charles F.

Martin, Chief Probation Officer, as guardian with right to consent to adoption. The order found among other things that the custodian had been served with process and was present in court; that the mother had filed her entry of appearance and written consent to entry of decree with full adoptive rights and that the alleged dependent child was before the court.

The only contention that is worthy of consideration, so far as the face of the record is concerned, is that Judith Finch as a defendant to the dependency petition was not served with summons. It is conceded that she signed the written entry of appearance and consent, but it is contended that there is no provision in the Family Court Act for the same. This contention is without merit. Par. 2007 expressly provides:

> "On default of the custodian of the child or on his appearance or answer, or on the appearance in person of the child in court with or without the summons or other process and on the answer, default or appearance or written consent to the proceedings of the other defendants thereto or as soon thereafter as may be, the court shall proceed to hear evidence." (Emphasis ours)

We therefore find that on the face of the record the statutory requirements have been complied with.

On August 22, 1961, Judith Finch filed a motion to vacate the dependency order of June 21, 1961. Despite the earnest contention of counsel for defendant in error that this motion was not filed in apt time, we feel constrained to review the matter.

In this motion she alleged in substance that she was a resident of Macon County, Illinois, had not been served with summons, that her entry of appearance, consent and consent to adoption of June 8, 1961, were void, that Leslie Finch was a resident of Macon County and was never at any time within Sangamon County, that Jasper Gullo never had custody of Leslie Finch but that custody had been in Floyd R. Jones and Betty Jones. It is significant to note that in her motion to vacate Judith Finch does not allege that she is now able to fulfill her maternal duties to her child or that her circumstances have changed. On the other hand her attack upon the dependency order is based solely on a lack of jurisdiction.

The motion to vacate was set for hearing on September 6 and 7, 1961, at which time evidence was heard by the County Court. A fair evaluation of this testimony discloses that Judith Finch, a young lady in her twenties, lived in Decatur, Illinois. She had finished one year of high school, taken a course in beauty work and was a licensed beauty operator. Although never married, she had given birth to a boy prior to the birth of Leslie Finch, the girl in question, and at the time of the signing of the dependency petition was pregnant a third time. This third child was born in August, 1961. Judith Finch was acquainted with a girl by the name of Norma Kelly. According to Norma Kelly, Judith

had told her in May of 1961 that she wanted to place Leslie Finch for adoption. She wasn't working at the time and said she couldn't afford anything. This is not denied by Judith Finch. Norma Kelly knew that Betty Jones and her husband were wanting to adopt a child. About three weeks after her conversatinn about adoption with Judith, Norma Kelly told Judith about the Jones. Judith Finch did not know the Jones and they did not know her. On a Sunday evening, June 4, Judith Finch, Leslie Finch and Norma Kelly went to the home of the Jones. The events that transpired that evening are in dispute. Mrs. Jones said they had a conversation and that she asked Judith if she really wanted to place Leslie for adoption and she answered in the affirmative. She then asked Judith "For a little while or for all the time" and Judith replied "For all the while". According to Mrs. Jones, Judith asked her to let her know when she went to a lawyer. Judith then subsequently left, leaving Leslie with the Jones'. The version of Judith Finch of the conversation with Mrs. Jones is that she told Mrs. Jones she was just leaving Leslie with them until the third baby was born.

On June 8, 1961,the Jones' and Judith and Leslie Finch went to Springfield. They first went to the office of Jasper S. Gullo. They then went to the county courtroom and saw Mary Baldwin, a

probation officer of the Family Court. The Jones', Leslie Finch, Judith Finch and Jasper Gullo were all present. Judith was introduced to and interviewed by Mary Baldwin. She then prepared the dependency petition and the entry of appearance and consent to adoption. The latter was given to Judith and she was told to read it. Judith testified that she did read it. Mary Baldwin testified she then explained to Judith the nature of the document and the consequences of her signing it. Judith denies this, however, Judith says she was not misled or deceived by Mary Baldwin in any way. Judith then gave custody of Leslie to Jasper Gullo, who picked her up and held her. Mary Baldwin signed the dependency petition and Judith signed the entry of appearance and consent to adoption. Mr. Gullo then left the courtroom with Leslie and the others did likewise. Subsequently Leslie Finch was given to the Jones' who had her in their home until the dependency hearing and the order was signed. The Jones' were in Springfield in Gullo's office on two or three occasions after June 8, 1961. The exact dates are not pinpointed in the record. It is a reasonable inference that they were there on June 21, 1961. The dependency order of June 21, 1961, finds that Leslie Finch and Jasper Gullo were in court on the date of the hearing and entry of the dependency order and there is nothing in the record to dispute this fact.

It is not disputed that Leslie Finch was within Sangamon County on June 8, 1961, the date of the dependency petition. This, under the statute was sufficient. I.L.P. Minors Sec. 14; 1948 Op. Atty. Gen. 78. We have already disposed of the contention that the court lacked jurisdiction of Judith Finch because she was not served with process. There remains the contention that the Jones' and not Jasper S. Gullo had custody or control of Leslie Finch on June 8, 1961, the date of the dependency petition. A fair interpretation of the Family Court Act indicates that the basic reason for naming the person or persons having custody or control of the minor is to give them an opportunity to be heard and to insure the presence of the child at the hearing of the petition. But here the Jones' are not complaining and are not asserting that they and not Jasper S. Gullo had custody or control of Leslie Finch. The plaintiff in error makes much of the fact that subsequently and up to the hearing date, Leslie Finch was in the Jones' home. However, it must be remembered that a temporary custody order was signed on June 8, 1961, giving temporary custody to Charles F. Martin, Chief Probation Officer, with right to place. Nothing appearing in the record to the contrary, it must be presumed that placement of Leslie Finch in the Jones' home, was with his consent or acquiescence.

In passing it should be noted that the jurisdiction of the Family Court in dependency cases is continuing. The adjudication of dependency is not res adjudicata as to future matters showing a change in condition. Until such time as the dependent child shall have reached majority or shall have been legally adopted by others, the order of dependency is subject to modification. Par. 2016 expressly provides:

> "Such child or any person interested in such child may from time to time upon a proper showing apply to the court for the appointment of a new guardian or the restoration of such child to the custody of its parents or for the discharge of the guardian so appointed."

Thus Judith Finch has a remedy, and upon the filing of a petition as contemplated by the above provision, she should be entitled to a hearing and to show that she is now able to fulfill the duties of motherhood. Neither the fact that the child has been born out of wedlock or the fact that the mother initially consented to adoption of the child (absent any final adoptive decree prior to a filing of the petition to modify) should abridge this right. In re Ramelow, 3 Ill. App. 2d 190, 121 N.E. 2d 41. Upon the filing of such a petition, if the State's Attorney acting for the People is convinced that the custody of Leslie Finch should be restored to her mother and the present guardian should be dis-

charged he can so advise the court. Had this course been pursued in the first instance, this appeal would have, in all probability, been unnecessary.

On the record as submitted to us we find no error and accordingly the judgment of the County Court of Sangamon County is affirmed.

Affirmed.

REYNOLDS, Presiding Justice, and CARROLL, Justice, concur.

dv V 40 #1

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

40 I A 2 19

General No. 10423 Agenda No. 11

Lillie Ferguson, Administrator of the Estate of Larry D. Ferguson, and Millard Ferguson and Lillie Ferguson	)	
Plaintiffs-Appellees	)	
vs.	)	Appeal from the Circuit Court of McLean County
Toledo, Peoria and Western Railroad, a corporation	)	
Defendant-Appellant	)	

CARROLL, J.

This is a wrongful death action brought by the administrator of the estate of Larry D. Ferguson, who was killed when the automobile he was driving came into collision with a train of the Toledo, Peoria & Western Railroad. Included in the action is the property damage claim of Millard Ferguson and Lillie Ferguson, owners of the automobile involved. A jury trial resulted in a verdict for $8,000 in favor of the administrator and $.975 in favor of the other plaintiffs. Upon entry of judgment on the verdicts and denial of its post trial motion, defendant appealed.

The complaint is in 2 counts, the first of which on behalf of the administrator of the estate of Larry D. Ferguson, deceased, alleges that at the time of the occurrence plaintiff's intestate and his next of kin were exercising due care for their safety; (a) that

defendant was negligent in failing to have adequate signal devices, etc., at an extra hazardous crossing; (b) in failing to guard against injury to motorists; (c) in failing to keep a look out for vehicles approaching the crossing; (d) in failing to warn of the approach of a train at the crossing; (e) negligently operating the train at a speed contrary to Sec. 60, Chap. 114, Ill. Stats., and the Chenoa Ordinance; (f) in permitting an obstruction at an intersection because of proximity of buildings; (g) in negligently operating its train and (h) failing to maintain signs to warn travelers of the presence of the tracks. The same charges of negligence are made in the second or property damage count.

Defendant's first contention is that plaintiffs failed to prove due care on the part of the decedent and consequently the trial court erred in refusing to direct a verdict for defendant and subsequently in denying its post trial motion for judgment notwithstanding the verdict.

The collision occurred May 23, 1959, at approximately 3 P. M. in Chenoa, a village of some 1,500 inhabitants, at the intersection of Veto Street with defendant's railroad tracks. The decedent was driving south on Veto Street which runs generally in a northerly and southerly direction. Defendant's single track railroad runs east and west, intersecting Veto Street at right angles and the train involved in the collision was approaching from the west. For several miles to the west the track was straight and level. Veto Street, which is about 22 feet wide, is paved and

straight and level for about 2 blocks north of the crossing. There were crossbuck signs on Veto Street on both sides of the crossing. These signs were on wooden posts 8 feet high and the one on the north side was approximately 32 feet north of the north rail of defendant's track and read as follows: "Railroad Crossing. 3 Tracks". At a point 205 feet west of the crossing the rails of the Gulf, Mobile and Ohio Railroad extended north and south, intersecting the defendant's tracks. A wooden building referred to by the witnesses as the "tower" is located just northeast of the intersecting tracks. The southeast corner of the tower is 164.3 feet west of Veto Street. To the east there is a one story building referred to in the testimony as a "shed", which is 63.8 feet West of Veto Street and 46.8 feet north of the north rail of defendant's tracks. One hundred forty feet north of the crossing, Veto Street is intersected by Commercial Street, which extends to the west. All witnesses appear to have agreed that on the day of the accident the area west of Veto Street and south of the "shed" was vacant and open. Accordingly, a motorist, when at the intersection of Veto and Commercial Streets, or 150 feet North of the crossing would have an unobstructed view of the defendant's tracks to the west as far as the tower. The train in question consisted of a diesel engine and 59 freight cars, each car being 45 feet long and 18 feet high. The diesel was equipped with 3 lights, 2 of which were stationary and the other rotated. At the time of the occurrence Veto Street was paved and dry and

visibility was good. A police officer who viewed the scene immediately following the accident found no skid marks on the pavement.

The deceased, who was 22 years old, was released from the Army in November, 1957. From then until his death he lived with his parents at Lake Bloomington on Route 66 south of Pontiac. Chenoa is also on Route 66 between Pontiac and Lake Bloomington. He was employed as a tree trimmer and was in good health. There was no evidence of impairment of his sight or hearing. The occasion for his presence in Chenoa on the day of the accident was not disclosed and the evidence as to his conduct just prior to the occurrence is meager. The only witness for plaintiffs who saw the decedent's car on Veto Street before it reached the crossing was Ray Bagley. He testified that on the day of the occurrence at about 3:59 P. M. he was driving his car south on Veto Street in Chenoa about a city block north of the crossing. When asked whether at that time he saw anything unusual at the crossing he answered, "Only thing I seem was a car fly up in the air." He further testified he later learned the automobile was that of the deceased; that he first saw the same car going south on Veto Street when it was about a half block from the crossing; that it was traveling at about 25 miles per hour; that the witness' car was going 30 to 35 miles per hour and that he was proceeding south on Veto Street and he did not hear any horn, bell or whistle.

Leonard Therien, a brother-in-law of the deceased, testified that he saw the deceased in the Curtis Drive In in Pontiac about a half hour before the accident; that in driving from Pontiac to Lake Bloomington it was not necessary to go through Chenoa and as far as the witness knew the deceased had never driven down Veto Street since his return from the service. Therien also testified he drove over the crossing the day after the accident; that as he proceeded south on Veto Street toward the tracks and was even with the south side of the shed he had a clear view of the tracks to the west to the tower for at least 100 to 200 feet; and that before he could see all the way down the track to the west he "was practically on top of the tracks."

Jerry Gillespie, Chenoa Chief of Police, a witness for plaintiff, testified a motorist in a car on a line with the south side of the shed looking to his right would have nothing to obstruct his vision and could see the railroad track down to the tower.

Clarence Hoselton, witness for plaintiff, testified that he had been familiar with the crossing for many years; that as far as his knowledge went the area south of the old building, or shed, toward the Toledo, Peoria & Western right of way had been open and vacant.

George Bowles, brakeman on the train at the time of the collision, testified he had been familiar with the Veto Street crossing for 11 years; that during all that period the area south of the

south side of the shed west of Veto Street was vacant; that before the collision he first saw the Ferguson auto more than a block north of the crossing and when defendant's diesel was west of the Gulf, Mobile and Ohio tower; that when the diesel was just past the tower he saw the auto a second time and it was south of the shed; that "it didn't slow down any at all because it just kept right on coming"; that he hollered to the engineer, who immediately started to apply the brakes for an emergency; that the auto did not turn its course to the right or left, slow down, or stop, but drove right in front of the train; that he had a clear view of the auto from the second time he saw it until the collision and that the train was going at the permitted speed of 45 miles per hour.

Leo Clark, engineer on the train, testified that at the time of the accident there were no obstructions in the area south of the shed; that he got a fleeting glimpse of the auto when it was probably 40 feet from the crossing and could not judge its speed; that he gave two whistle blasts to acknowledge the clear signal as the diesel approached the tower; that the bell was turned on a quarter mile from the crossing and from thereon it continued to ring; that he blew the whistle for the crossing and that the oscillating light on the diesel was in operation and had been turned on as the diesel left Peoria, Illinois, at the beginning of its trip at 1:25 the afternoon of the accident.

As shown by 2 photographs offered in evidence by plaintiff, Veto Street, where it crosses defendant's tracks, is wide, straight and level. One of the photographs taken with the camera facing south, or the same direction the deceased was traveling, shows the crossing and its crossbuck warning signs were plainly visible to anyone traveling south on Veto Street. However, these photographs shed no light upon the all important question as to whether decedent's view of the tracks to the west was obstructed. A photograph offered by defendant (D. Ex. 3) was taken with the camera on Veto Street at a point 75 feet 4 inches north of the north rail of the tracks with the lens pointed southwesterly. It shows that a motorist proceeding south would have an unobstructed view of the corner of the tower which is 164.3 feet west of the crossing. Another photograph (Def.'s Ex. 4) taken 13 feet 9 inches north of the north rail of the track shows when a motorist was at that point he could see the Gulf, Mobile and Ohio crossing tracks which are 205 feet west of Veto Street.

In view of the conclusion reached we omit further detailing of the evidence as it pertains principally to the several negligence charges in the complaint.

We think defendant's contention that plaintiff failed to establish an essential element of his case, namely, due care on the part of deceased, poses the decisive question in this case. In passing upon such question we are required to determine whether there is any evidence, when considered with all reasonable inferences

and intendments to be drawn therefrom in its aspects most favorable to the plaintiff, fairly tending to prove that at and just prior to the occurrence decedent was in the exercise of due care. If there was a total absence of such evidence, then the trial court should have sustained defendant's post trial motion for judgment notwithstanding the verdict.

The conduct of a motorist approaching a railroad crossing which will entitle him to successfully maintain that he exercised due care has been the subject of comment in numerous cases. In Tucker v. N.Y.C. & St. Louis R.R. Co. 12 Ill. 2d 532, 147 N.E. 2d 376, the Court said:

> "It is well settled that railroad crossings are dangerous places, and that in crossing them a person must approach the track with a degree of care proportionate to the known danger. The law requires that the traveler make diligent use of his senses of sight and hearing and exercise care commensurate with the danger to be anticipated. (Moudy v. New York, Chicago and St. Louis Railroad Co. 385 Ill. 446; Provenzano v. Illinois Central Railroad Co. 357 Ill. 192; Greenwald v. Baltimore and Ohio Railroad Co. 322 Ill. 627.) Nor does the law tolerate the absurdity of permitting a plaintiff to say he looked and did not see the approaching train, when had he looked he would have seen it. (Dee v. City of Peru, 343 Ill. 36; Greenwald v. Baltimore and Ohio Railroad Co. 332 Ill. 627; Holt v. Illinois Central Railroad Co. 318 Ill. App. 436.)"

Failure to look and listen may be excused only where there are facts and circumstances such as obstructions to view or distractions tending to confuse or lull a plaintiff into a false sense of security.

The burden of establishing the element of due care rests upon the plaintiff. As the Court said in Overman v. Ill. Cent. R. Co. 34 Ill. App. 2d 30, 180 N.E. 2d 213:

> "The claim that care and caution by any person has been exercised cannot be sustained when the known facts disclose that ordinary care would have avoided the accident. There must be some evidence tending to prove due care by the decedent. The burden is on the plaintiff. Due care cannot be presumed from the mere fact of the happening of an accident and a consideration of the human instinct of self-preservation. Liability cannot rest upon imagination, speculation, or conjecture, nor upon a choice between two views, equally compatible with the evidence, but must be based upon the facts established by evidence fairly tending to prove them. If the record is without evidence of due care by the decedent, the decedent was necessarily guilty of contributory negligence as a matter of law and the Court should instruct the jury to render a verdict for the defendant. (Citing a number of cases)"

In this record we fail to find any evidence which warrants the conclusion that prior to and at the time of the collision plaintiff's intestate was exercising due care for his safety as alleged in the complaint. If the decedent was unaware that he was approaching a railroad crossing, which it must be conceded is a dangerous place, such ignorance is unexplained by the record. The evidence shows that the crossing and its warning signs were in plain sight and of necessity would be in decedent's line of vision as he drove his auto south on Veto Street. Thus being alerted to the fact he was approaching the crossing, ordinary care required him to make diligent use of his senses of sight and hearing to learn whether or not a train was approaching and to so control his

upon the plaintiff. As the Court said in Wagoner v. Ill. Cent. R.

Co., 31 Ill. App. 21 27, 28; R. v. 213:

automobile as to be in a position to stop if circumstances rendered such action necessary. Chenoa is a small village and as disclosed by the photographs the crossing in question was outside of the business section. If there were any noises or other factors which might distract or confuse decedent, such situation is not shown by the evidence. The only evidence as to decedent's conduct as he approached the crossing was furnished by the witness Bagley, who saw him driving on Veto Street one half block from the crossing and later saw a car, "fly up in the air". Such testimony, plus the fact that no skid marks were found, would only tend to show that decedent entered upon the crossing without stopping. From the photographs and the testimony of witnesses for both the plaintiffs and the defendant, it appears that when decedent was 75 feet north of the crossing he had an unobstructed view of the track to the west for a distance of 164.3 feet and when 13 feet 9 inches north of the crossing, the tracks were visible to the west for more than 200 feet. It is undisputed that when decedent was a block north of the crossing the diesel was west of the tower or about 200 feet from him. Its lights and bell were operating. The diesel was pulling 59 freight cars and it is a reasonable inference that it created the usual noises which accompany a moving freight train. If decedent had then looked to his right he could not have escaped seeing the approaching train and would have been in a position to exercise the care required of him under the circumstances. Likewise if decedent had looked to the west when he was either 75 feet 4 inches or 13 feet 9 inches north

of the crossing, there was nothing to prevent him from seeing the train and if he was driving in the manner which the presence of a railroad crossing required, he could have stopped. It may also be observed that this is not a situation where failure to look and listen may be excused because of an obstruction which might lull the decedent into a false sense of security. Plaintiffs argue in substance that whether the actions of decedent under the circumstances were those of a reasonably prudent person was dependent upon the relative speeds of the train and automobile as they approached the crossing. Such an argument might be applicable if we were considering a collision between 2 motor vehicles at a street or highway intersection, but it is not pertinent in this case. Decedent here was approaching a railroad crossing and the question as to whether he had the right of way was not involved.

We are of the opinion in this case that the evidence fails to show that plaintiff's intestate was in the exercise of due care and fails to show that such lack of due care on the part of plaintiff's intestate was not the proximate cause of the occurrence. Accordingly, the trial court should have directed a verdict in favor of defendant on both counts or allowed its post trial motion for judgment notwithstanding the verdicts. Therefore the judgments of the Circuit Court of McLean County are reversed.

Reversed.

REYNOLDS, P.J. and ROETH, J., concur.

48531

401 A2 116

GENEVIEVE LAYTON,	)	
	)	
Appellant,	)	APPEAL FROM
	)	
v.	)	
	)	CIRCUIT COURT,
GEORGE LAYTON and GLORIA PARKER,	)	
	)	
Defendants,	)	COOK COUNTY
	)	
GLORIA PARKER,	)	
	)	
Appellee.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Plaintiff filed a complaint against George Layton, her husband, in which she sought separate maintenance. He filed a cross-complaint, and on hearing was awarded temporary support money and attorney's fees. On the theory that a constitutional question was involved, plaintiff appealed directly to the Supreme Court which held that since neither the validity of a statute nor the construction of the constitution was involved, it was without jurisdiction, and accordingly transferred the cause to this court. (Layton v. Layton, 4 Ill.2d 241, 244, 122 N.E.2d 531 (1954).) We concluded that the evidence failed to establish that plaintiff was guilty of any misconduct that would warrant separation, and reversed the order of the trial court on the ground that the parties had separated "by mutual consent." We pointed out that the question whether plaintiff could maintain her complaint for separate maintenance was not before us, since the appeal was from an order awarding temporary alimony and attorney's fees. (Layton v. Layton, 10 Ill. App.2d 339, 134 N.E.2d 635 (Abst.1956).)

In count II of her complaint, which was subsequently filed and thereafter amended, plaintiff alleged a cause of action for alienation of affections against Raymond and Gloria Parker,

husband and wife. Raymond Parker died before trial, and the cause proceeded against Gloria Parker. Plaintiff alleged that she and her husband George Layton were married in Chicago in June of 1921; that they lived together happily until 1952; that over a period of time from 1949 to 1952, when they separated, defendant Gloria Parker "started and maintained a course of conduct by acts words and deeds" calculated to induce George Layton to desert and abandon plaintiff; and that defendant's efforts were successful, resulting in the separation of the Laytons, destroying the affection that had existed between them, and causing injury and damage, including loss of consortium, marital benefits, and support. Trial by jury resulted in a verdict and judgment in favor of defendant. Plaintiff appeals from that judgment and also from the order denying her postjudgment motion for a new trial.

By inadvertence, as defendant's counsel says, defendant did not answer or otherwise plead to the amended complaint, and plaintiff contends that by reason of such failure defendant admitted the allegations of the amended complaint. In re Estate of Marsh, 31 Ill. App.2d 101, 175 N.E.2d 633 (1961), is in point on this question. There the petitioners filed no answer to a petition for letters of administration and no reply to an answer to a petition to admit to probate the copy of a purported will; on appeal respondents urged, for the first time, that by reason of the absence of such pleadings the petitioners admitted the allegations set forth in the petition and answer referred to. The case had been tried without a formal written issue being made. We held (p. 104) that since the respondents did not raise the point during trial, they were "in no position to assert that appellees [petitioners] admitted

the allegations of the petition and the answer." In an earlier case, Witteman Co. v. Goeke, 200 Ill. App. 108, 113-114 (1916), the court held it to be well settled in Illinois that when parties voluntarily go to trial without the formation of a written issue, the case is treated as if an oral issue had been formed. In accord are City of Chicago v. Campbell, 27 Ill. App.2d 456, 462, 170 N.E.2d 19 (1960); Head v. Wood, 20 Ill. App.2d 97, 103, 155 N.E.2d 348 (1959); Allen v. American Milling Co., 209 Ill. App. 73, 76 (1918); and Butler v. National Live Stock Ins. Co., 200 Ill. App. 280, 285 (1916).

As to the remaining ground for reversal, it is urged that the court excluded proof of defendant's motives in relation to the charge of alienation of affections. Specifically plaintiff attempted to show that defendant pursued a course of action and instigated various lawsuits for the purpose of alienating the affections of plaintiff's husband and of breaking up the home and family life of the Laytons. Plaintiff contends that it was at defendant's urging that George Layton, in April of 1953, filed a partition suit in an attempt to deprive plaintiff, as she puts it, of her real estate. George Layton prevailed in the trial court, which set aside the real estate deed in question and ordered partition of the property. On appeal to the Supreme Court Mrs. Layton was successful in having the decree reversed and the cause remanded with directions to dismiss the case for want of equity. (Layton v. Layton, 5 Ill.2d 506, 126 N.E.2d 225 (1955).) But there is no evidence to substantiate plaintiff's contention that it was at Mrs. Parker's urging that George Layton instituted the suit.

At the time of the hearing on count II, plaintiff testified that defendant had said, presumably before the commencement of the separate maintenance action, "'Mrs. Layton he doesn't want you

anymore.'" Plaintiff holds defendant responsible for the cross-complaint filed by George Layton in the separate maintenance suit. In further testimony during the hearing on count II, plaintiff said that immediately after her husband had been awarded temporary alimony on his counterclaim, she saw him and the Parkers in the corridor outside the courtroom, and overheard Mrs. Parker say to him, "'George you won the case, you can pay us back when you get the money.'" Mrs. Layton also testified that, following an attempt on the part of the commissioner to effect a reconciliation, which her husband spurned, as they left the courtroom and walked into the corridor, Mrs. Parker said to him, "'[N]ow you are rid of her, you come with us and we will make you manager of our property.'" We adhere to our holding in our earlier Layton case that the parties separated "by mutual consent," for there is nothing in the record before us to warrant a different finding.

Plaintiff argues that she was entitled to introduce in evidence all her elements of damages, which consisted of attorney's fees and costs incurred in the separate maintenance proceeding and the partition suit. She contends that proof of such damages would sustain her charge that defendant alienated the affections of plaintiff's husband. At the close of all the evidence in the instant proceeding, plaintiff's counsel said: "The plaintiff rests, subject to our putting in the other damages." There followed a colloquy between court and counsel, in the course of which the court asked plaintiff's attorney if he wanted to enumerate damages for the record. He then proceeded to itemize the fees and costs relative to the separate maintenance and partition matters. Plaintiff claims the court excluded her offer of proof. However, the record shows that no witness was put on the stand, no questions were asked;

there was merely a conversation between court and counsel. In Ragen v. Bennigsen, 10 Ill. App.2d 356, 135 N.E.2d 128 (1956), we passed on a similar conversation between court and counsel, and held (p. 361) that "such procedure does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence." Furthermore, it is not readily apparent how proof of expenses for attorney's fees and court costs can prove the motive attributed by plaintiff to defendant; the causal relationship is too remote.

Moreover, when counsel proceeded to itemize the various costs there was no suggestion that this purported offer was for the purpose of showing motive, as plaintiff is urging on review. Plaintiff is now attempting to change the purpose of the offer. In Hairgrove v. City of Jacksonville, 366 Ill. 163, 8 N.E.2d 187 (1937), an offer of proof was made for one specific purpose, while other purposes were argued on appeal as grounds for reversal. The court said (p. 182) that "in passing upon the propriety of the court's refusal to receive such testimony [as to other purposes], we may look only at the purposes of the offer as stated on the record." Finally, it should be noted that the legislature has provided that the damages to be recovered in any action for alienation of affections are to be limited to the actual damages sustained as a result of the injury complained of. (Ill. Rev. Stat. 1961, ch. 68, § 35.) The validity of this statute was upheld in Siegall v. Solomon, 19 Ill.2d 145, 166 N.E.2d 5 (1960).

We find no convincing reason for reversal; therefore the judgment and order of the Circuit Court are affirmed.

JUDGMENT AND ORDER AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

48848

401 A 2 167

LINDSEY HAYNES, Plaintiff-Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
MULTI-STATE INTER-INSURANCE EXCHANGE, Defendant-Appellant.	)	COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Plaintiff's statement of claim alleged that on March 28, 1961, defendant executed and delivered to him its policy insuring his described automobile against loss or damage by fire for a term of one year commencing April 15, 1961; that on September 12, 1961, while the policy was in force, the automobile was totally destroyed by fire; that he gave due notification, made claim for the loss and performed all the conditions of the policy. He asked judgment for $2,000. In a third amended answer defendant denied that there was a policy of insurance "as alleged" in the statement of claim, asserted that the policy was canceled on June 28, 1961 and surrendered to it on June 27, 1961, "for purposes of cancellation," denied that plaintiff suffered a loss "in the sum of $2,000," denied that the policy was in force at the time of the alleged fire and denied the "allegations of notice."

The record shows that on February 28, 1962, the following judgment was entered:

> "Now comes the plaintiff herein and moves the Court to strike the Third Amended Defense and the Court being fully advised in the premises, sustained said motion and thereupon it is ordered by the Court that the Third Amended Defense be and it is hereby stricken, and Now come the parties to this cause and thereupon the trial of this cause is now here entered upon before the Court without a jury, and the Court having heard the evidence and the arguments of counsel, and being fully advised in the premises, enters the following finding, to-wit:

> 'The Court Finds the Issues Against The Defendant, Multi-State Inter-Insurance Exchange, and Assess Damages At The Sum of Two Thousand And No/100 Dollars ($2,000.00)'
>
> This cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment on the finding herein and that the plaintiff have and recover of and from the defendant, Multi-State Inter-Insurance Exchange the damages of the plaintiff amounting to the sum of Two Thousand And No/100 Dollars ($2,000.00) in form as aforesaid assessed, together with the costs by the plaintiff herein expended and that execution issue therefor."

Defendant appeals.

Defendant maintains that there was no proper motion to strike the third amended answer under Section 45 of the Civil Practice Act (adopted by the Municipal Court of Chicago) requiring that all objections to pleadings be raised by motion pointing out specifically the defect complained of and asking appropriate relief. In his various motions to strike or to enter judgment, plaintiff served notice that he would appear in court on a day certain and move to strike or to enter judgment. In these instances plaintiff did not present or file a written motion. He made his motions orally. There was no objection to this procedure. Section 42(3) of the Civil Practice Act states that all defects in form or substance not objected to in the trial court are waived. A motion is a pleading. As a general rule objections to a pleading may be waived by a failure to urge the objection at the proper time and in the proper manner or by any act which, in legal contemplation, implies an intention to overlook it. 71 C.J.S. Pleadings, p. 1128 § 563a. Both parties proceeded in an informal manner. The defendant is not in a position to assert non-compliance with Section 45 of the Practice Act.

Defendant insists that the court erred in striking its answer and entering judgment. Plaintiff calls our attention to the

fact that the judgment order recites that the court heard evidence and the arguments of counsel. Plaintiff argues that the issues having been tried, we are required to assume that the court decided the case correctly. It is well established that upon appeal every reasonable intendment not negatived by the record will be indulged in support of the judgment. Union Drainage District #5 v. Hamilton, 390 Ill. 487, 493. The defendant's praecipe did not require the clerk to incorporate in the record the report of proceedings at the trial. During oral argument the lawyer for the defendant stated that there was no trial and that no evidence was presented. He said there would not be a need for trial because the third amended answer was stricken. Despite the striking of the answer the trial could and according to the record proceeded to try the case without an answer. An answer may be waived by the conduct of the parties. During oral argument plaintiff's lawyer said that various documents in the way of evidence were presented and considered by the trial judge and that various statements were made by the respective attorneys.

All reasonable presumptions are indulged in favor of the judgment. The burden of affirmatively showing error is on the one complaining of the error. City of Chicago v. Rosehill Cemetery Co., 349 Ill. 619, 621. Where the determination of a question presented for review depends on evidence and the record on appeal does not show or purport to show the evidence, it will be presumed that the evidence was sufficient to sustain the judgment. Janecko v. Appleton Electric Co., 38 Ill. App.2d 116. We are required to assume that a report of proceedings would sustain the judgment. For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and FRIEND, J., concur.

40 IA2-191

48952

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. MICHAEL R. CIRULLO, Plaintiff in Error.	)	ERROR TO CRIMINAL COURT OF COOK COUNTY

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

On the 2nd day of February, 1956, Michael R. Cirullo was indicted for statutory rape among other things, he was arraigned and thereafter on the 22nd day of January in the year 1957 Michael R. Cirullo entered a plea of not guilty to the charge of statutory rape and the charge in the second and third count of the indictment and plead guilty upon the fourth count of the indictment, that he was guilty of taking indecent liberties with a child in manner and form as charged in count four of the indictment in this cause and on February 6th, 1957 an order was entered in the Criminal Court of Cook County whereby the said Michael R. Cirullo was placed on probation for five years, conditioned that the first 90 days of probation be served in the Cook County Jail. Defendant Cirullo was to have private psychiatric supervision. From then on until December 2, 1961 nothing further transpired. On December 2, 1961, some four and one-half years later, still within the original probationary period, defendant exposed himself to Mrs. Peggy Timmons. On December 8, 1961, defendant not being present, the Criminal Court let a warrant issue for violation of probation with bond set at $2,000.

On December 27, 1961 defendant was present in court in his own person and by counsel, bail was given--$2,000, day to day. On February 5, 1962 no further action had been taken and that was the

time that his period of probation would expire under the five year probation.

On April 16, 1962, a rule to show cause why probation should not be revoked and terminated was entered and defendant was apprised of such action. On May 2, 1962 the bond was forfeited and an order of court for warrant to issue for violation of probation was entered and the cause was continued until May 11th and by an agreement between the State's Attorney, the defendant and his counsel, this cause was continued until May 23, 1962.

A written motion for discharge was filed on May 23, 1962 charging the court lacked jurisdiction. After continuing the cause on motion to June 4th the defendant's motion was denied, probation was revoked and the defendant was sentenced to serve nine months in the county jail. Defendant filed his Notice of Appeal on September 26, 1962.

The sole question before this court is whether the Criminal Court lost jurisdiction of the defendant when the five year date of the original sentence had passed.

The defendant further asserts that the tolling clause of Section 789.1 (Ill. Rev. Stat. 1961, Ch. 38, §789.1) approved August 1, 1961, which would otherwise retain jurisdiction in the Criminal Court, was not in effect on the date of the issuance of the warrant, December 8, 1961 and therefore cannot be relied upon.

Section 789.1 (Ill. Rev. Stat. 1961, Ch. 38, §789.1)reads in part as follows:

> "Within the period of any probation, upon a written statement of facts charging a violation thereof * * *, the Court may issue a warrant for the arrest of the probationer. Therewith, bail shall be fixed as in criminal cases * * *. The issuance of such warrant shall toll the running

> of the probation period until final determination of such charge, but shall not operate to extend the period of probation of any probationer whose probation is not revoked as a result of the hearing * * *."

The tolling amendment was passed by both houses of the General Assembly prior to July 1, 1961, and became effective on approval by the Governor on August 1, 1961. See Board of Education v. Morgan, 316 Ill. 143, 148. As this amendment was in force at the time the warrant was issued in December 1961, the court had jurisdiction.

The issuance of the warrant within the probationary period exclusive of the tolling clause of Section 789.1 is a sufficient act with which to maintain continued jurisdiction until the final court decision. People v. Cahill, 300 Ill. 280, 283. That all of the technical provisions are not involved in the provision for the termination of probation and provides:

> "A cause continued pursuant to the provisions of this act shall be deemed subject to the jurisdiction of the court in which it is pending, or any judge thereof, for the full period of its continuance, during which time orders may be entered with respect to the conditions of probation, or final sentence imposed without the formal setting aside of such order of continuance." People v. Cahill, 300 Ill. 280, 285.

When the defendant appeared in court to have his bond set on December 8, 1961, that was sufficient notice to him that steps were being taken to revoke the probation order and all subsequent proceedings were with that notice. It is not necessary that all the technical provisions in criminal procedure be followed. People v. Kostaken, 16 Ill. App.2d 395, 398 et seq.

The judgment revoking the probation and sentencing defendant to serve a term of nine months in the Cook County Jail is affirmed.

AFFIRMED.

BURKE, J., and FRIEND, J., concur.

40 IA 280

48688

CAREBUILT CORPORATION, HUGH W. URBAN, and OTTO C. STEPHANI, Appellants, v. W. F. HORSTING, JR., W. F. HORSTING, SR., ALBERT W. CLUTTER, L. R. MORROW, ASSOCIATES DEVELOPMENT COMPANY, DR. E. S. BURGE, and NEIL W. KROTH, individually and as co-partners doing business under the assumed name of Hanell Electronics, Inc., and HANELL, INCORPORATED, a corporation, Appellees.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Under date of October 14, 1960 plaintiffs entered into a letter agreement to sell to defendants an industrial building located at 4140 George Street, Schiller Park, Illinois, for $130,000.00. The agreement was in the form of a letter addressed to Otto C. Stephani, one of the plaintiffs, and was written by W. F. Horsting, Jr., and L. R. Morrow, Sr., two of the defendants. As evidence of their good faith defendants enclosed two checks, each in the amount of $2500.00; as an indication of plaintiffs' acceptance of the terms Stephani signed at the close of the letter. The agreement provided for assumption of or, at the option of the purchasers, renegotiation of a $55,000.00 mortgage on the property. The letter in part read:

> "As evidence of our good faith we hand you with this letter the sum of $5,000.00 which is to apply on the $25,000.00 cash payment. In the event we do not complete legal transfer of the property on or before 45 days from date, you are to return said $5,000.00 deposit, and this entire transaction is to be considered null and void and each party agrees to hold the other harmless for any and all damages which might arise.
>
> "It is further agreed that in the event Associates Development Company is unable to work out proper financing for the building, or for any other reason they may withdraw from this deal without penalty at anytime during the above described 45 days."

The transaction was not consummated, and on November 29, 1960 a further letter was sent to plaintiffs, advising them that "we elect to have you return the ($5000.00) Five Thousand Dollars deposit to us within 48 hours, by check payable to Dr. E. S. Burge (our source for the original deposit), L. R. Morrow, Sr., and W. F. Horsting, Jr., as we have not been able to complete arrangements for the financing of the purchase of the property." Plaintiffs signified their acceptance of this request by affixing their signatures to a copy of the document, but they refused to return the earnest money and subsequently instituted suit. In count I of their amended complaint they sought damages for losses sustained by reason of the fraud and deceit practised by defendants in assuming or abusing corporate powers in violation of sections 157.15, 157.102, and 211.1 of the Corporations Act (Ill. Rev. Stat. 1961, ch. 32); and plaintiffs asked for a finding that malice was the gist of the action. In count II they asked for a declaratory judgment determining the rights and liabilities of the parties to the transaction, and the rights, if any, of each of the parties to the $5000.00 partial payment on the purchase price. Defendants Morrow, Kroth, and Hanell, Incorporated, filed their answer denying the material allegations of the complaint. The remaining defendants filed their answer likewise denying the material allegations of the complaint, and in addition filed their counterclaim asking judgment against plaintiffs in the sum of $5000.00, together with costs. Plaintiffs filed their answer to the counterclaim. Pursuant to a hearing on the motion of counterclaimants for judgment on the pleadings, the court dismissed the amended complaint, denied plaintiffs' motion to file a second amended complaint, and entered judgment on the pleadings in favor of

counterclaimants for $5000.00 and costs, from which plaintiffs appeal.

The original agreement of October 14, 1960 and the supplemental agreement of November 29, 1960 are free from ambiguity. The contract conferred upon the signatory defendants an absolute right to a return of the $5000.00 deposit "in the event we do not complete legal transfer of the property on or before 45 days from date," and in that circumstance the entire transaction was "to be considered null and void and each party agrees to hold the other harmless for any and all damages which might arise." The agreement further specifically provided that if defendants were "unable to work out proper financing for the building, or for any other reason," they could withdraw from the deal without penalty at any time within the forty-five days prescribed.

The letter agreement of November 29, 1960 informed plaintiffs that defendants had elected to have their deposit of $5000.00 returned to them "by check payable to Dr. E. S. Burge (our source for the original deposit), L. R. Morrow, Sr., and W. F. Horsting, Jr., ..." Plaintiffs accepted and confirmed this demand by affixing their signatures to a copy of this letter, and it seems to us they thereby acknowledged and agreed that $5000.00 was immediately due and owing.

Plaintiffs contend that in entering into the agreement of November 29, 1960 they relied on what they characterize as the false representation that Hanell Electronics was a corporation authorized to do business within the State of Illinois. Since plaintiffs had at that stage already agreed to terminate the original agreement and return the $5000.00 deposit we fail to perceive how they could possibly be damaged by this representation, if it was made. The same comment may be made concerning the agreement of

October 14, 1960 since the right of defendants to demand a refund of the $5000.00 deposit was absolute and unconditional. The contention that Hanell Electronics was not then incorporated under the laws of Delaware or qualified to do business in Illinois is a non sequitur. However, Hanell Electronics had been duly organized in Delaware on October 21, 1960, more than a month before the agreement of November 29, 1960. Moreover, the original $5000.00 payment was made with two checks drawn on the account of Hanell Electronics, and its nonexistence as of the date of payment did not preclude the enrichment of the individual plaintiffs to the extent of $5000.00.

The amended complaint contains numerous allegations, none of which, in our opinion, afford cogent reasons for obviating or modifying the rights of defendants under the two agreements. In Tompkins v. France, 21 Ill. App.2d 227, 157 N.E.2d 799 (1959), the pleadings showed that the defendants presented to the plaintiff a form of contract differing substantially from the preliminary agreement. It was held (p. 231) that the court properly entered judgment on the pleadings since the action of the defendants was tantamount to a repudiation of the agreement, and there was no issue to be tried. In Milanko v. Jensen, 404 Ill. 261, 88 N.E.2d 857 (1949), the court said (p. 265) that where, after the defendant's answer is filed, the plaintiff moves for judgment on the pleadings, such motion requires a resolution, as a matter of law, of the sufficiency of the pleadings: whether plaintiff is thereupon entitled to the relief sought by his complaint or, alternatively, whether defendant, by his answer, has set up such a defense as to entitle him to a hearing on the merits. In Brown v. Gill, 343 Ill. App. 460, 99 N.E.2d 393 (Abst. 1951), the court held that a motion

for judgment on the pleadings cannot be sustained except where, under conceded facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced. Even if all the allegations in the amended complaint (which are of a varied nature and too long to be encompassed within the limits of this opinion) could be sustained by credible evidence, they could not detract from, modify, or militate against the absolute right granted to the signatory defendants in the agreement of October 14, 1960 and in the later agreement of November 29, 1960. The allegations are inconsistent with the contractual provisions that in the event of failure to consummate a legal transfer of the property "this entire transaction is to be considered null and void and each party agrees to hold the other harmless for any and all damages which might arise."

Plaintiffs express concern about the disposition of the judgment proceeds because, as they say, the funds are ultimately to be paid in their entirety to Dr. E. S. Burge, a stranger to the agreement, but all the defendants consented to the form of the judgment order, and whether one or more of the defendants finally receive the proceeds is not a concern of plaintiffs. The agreement of November 29, 1960 specifically provided that the $5000.00 deposit was to be returned to Dr. E. S. Burge, L. R. Morrow, Sr., and W. F. Horsting, Jr.; both answers of defendants stated that "there are no conflicting or diverse claims on the part of the defendants but on the contrary all of the defendants are agreed that the said sum of $5,000.00 is the sole and exclusive property of the defendant, DR. E. S. BURGE"; and in their brief defendants asserted that "the trial court was informed by both counsel for the defendants that the defendants were in perfect accord and agreement as to the distribution of the judgment fund."

Plaintiffs feel aggrieved because the court denied their motion to file a second amended complaint. No transcript of the proceedings before the trial judge was presented, but under the circumstances we do not think the court abused its discretion in denying the motion to amend.

Lastly, it is urged that plaintiffs made improvements on the building in the amount of $3400.00. Presumably the improvements enhanced the value of the property; the building is in the possession of plaintiffs, and since they agreed to hold defendants harmless, we do not consider this point a cogent reason for reversal.

The judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

Abstract

Gen. No. 11640 Agenda 10

IN THE

APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A.D. 1963

40 IA 2-416

STANLEY W. EVASKUS, PHILIP F. ATWOOD, PAUL W. MORROW and FRANK P. JARECKI, Plaintiffs and Appellants and Cross-Appellees, and CHARLES O. HECKEL, Plaintiff and Appellant, vs. NEFF, KOHLBUSCH & BISSELL, INC., Defendant and Appellee and Cross-Appellant.	Appeal from the Circuit Court of Lake County.

FILED
APR 8 - 1963
PAUL V. WUNDER
Clerk Appellate Court Second District

CROW, J.

These suits were filed on behalf of the plaintiffs, Stanley W. Evaskus, Philip F. Atwood, Paul W. Morrow, Frank P. Jarecki and Charles O. Heckel to recover commissions allegedly earned, but not paid, and due each of them under separate employment agreements with the defendant Neff, Kohlbusch & Bissell, Inc., and for other relief. The cases were consolidated for trial and were tried before the court without a jury. Judgments were entered December 1, 1961 for Evaskus for $8237.59, Atwood $11,748.93, Morrow $2,910.73, and Jarecki $4,183.11, and that each of those plaintiffs take nothing, respectively, to the extent of $1,155.49, $1,968.59, $7,128.26, and $2,501.17, and that the plaintiff Heckel take nothing as to his claim. The plaintiffs Stanley W. Evaskus, Philip F. Atwood, Paul W. Morrow, and Frank P. Jarecki appeal from

part of the judgments as to them. The plaintiff Charles O. Heckel appeals from the entire judgment as to him. And there is a cross appeal by the defendant Neff, Kohlbusch & Bissell, Inc. from the judgments entered in favor of the plaintiffs Evaskus, Atwood, Morrow, and Jarecki.

On October 18, 1960 four of the plaintiffs, Stanley W. Evaskus, Philip F. Atwood, Paul W. Morrow, and Frank F. Jarecki filed their separate unverified complaints, and on November 2, 1960 an unverified complaint was filed on behalf of the plaintiff Charles O. Heckel, against the defendant, Neff, Kohlbusch & Bissell, Inc. Each of the complaints originally consisted of two counts, - Count I was a demand for commissions, - and Count II sought damages for alleged breach of contract. Later the Court granted the plaintiffs leave to withdraw Count II.

A copy of the separate employment contracts was attached to each of the complaints as an exhibit. Paragraph Ninth of all the contracts was as follows:

> "NINTH: Upon termination of this agreement the Company shall have the right to withhold from the Sales Engineer twenty-five per cent (25%) of all commissions which may become due and payable on all orders credited to the Sales Engineer but which commissions are not earned as herein set forth upon the date of such termination, to pay the expenses of the Company of completing and servicing such orders, not applying in case of total disability or death."

In addition, Paragraph Fourteenth of the Morrow, Jarecki, and Heckel contracts was as follows:

> "FOURTEENTH: In the event the Sales Engineer leaves the employ of the Company and enters into a business which competes with the Company, whether the Sales Engineer joins another Dealer organization or a direct Factory organization or goes into a competitive business himself in the territory now covered by Neff, Kohlbusch & Bissell, Inc., the Sales Engineer will forfeit all commissions on unfilled orders as of the date of his termination of employment."

That Paragraph Fourteenth was not in the other contracts. In addition, of particular interest as to the claim of the plaintiff Heckel, the contract provided in Paragraphs Third and Eleventh as follows:

> "THIRD: The Sales Engineer agrees to devote his entire time to the employment contemplated by this agreement and to accept the assignment of such territory and such customers as the Company from time to time may designate in writing. The Company agrees to assign to the Sales Engineer certain specified territory or certain stipulated customers, but the Company specifically reserves the right to change such territory or customers at any time and for any reason and to withdraw the same from the Sales Engineer for re-assignment or for transfer and designation as 'House Accounts', provided, however, before any such re-assignment or transfer shall be made the Company shall give to the Sales Engineer not less than thirty days prior notice thereof."

> "ELEVENTH: This agreement will automatically terminate upon the death or disability of the Sales Engineer, and may be terminated by the Company at any time upon giving to the Sales Engineer not less than thirty (30) days written notice of such intention to terminate."

In addition, of particular interest as to the Atwood claims, though Paragraph Seventh 1A is of general applicability to the claims of all the plaintiffs, Paragraphs Second and Seventh 1A provided that:

> "SECOND: The Company, for and on its own behalf and on behalf of the manufacturing organizations for whom it acts as agent, specifically reserves the right to refuse or reject, in whole or in part, any order submitted by the Sales Engineer and to cancel or modify, in whole or in part, such order after the acceptance thereof, and to consent to the cancellation or modification of any such order, in whole or in part, before or after the shipment of the merchandise thereby covered, and to accept any and all returns of merchandise and grant such allowances as the Company may deem proper. All commissions payable to the Sales Engineer on any such transactions shall be modified whether paid to the Sales Engineer in whole or in part or not, in accordance with any such modification of such orders."

> "SEVENTH 1A: The Company agrees to pay to the Sales Engineer a Commission of forty per cent (40%) of the gross commission received by the Company upon all orders procured by and credited to the Sales Engineer. A commission shall not be considered earned by the Sales Engineer, nor received by the Company, until the Company shall have received payment in cash of such commission, and shall be subject to subsequent adjustment as set forth in paragraph Second hereof.

The Company's commission shall be the actual amount received by the Company after any adjustments thereon which the Company may be required to make by contract, law or otherwise."

The defendant requested Bills of Particulars in November, 1960. It cooperated with the plaintiffs in the preparation thereof. In that process it furnished certain purported summaries of commissions due Evaskus, Atwood, Morrow, and Jarecki, dated March 29, 1961. In those summaries the 25% of commissions not earned, which was to be withheld, if Paragraph Ninth of the agreements be valid and applicable, was erroneously stated to be less than it should have been because commissions on orders which had been shipped but where Neff etc. had not received payment in cash of its commissions (and which, presumably, under Paragraph Seventh 1A, were not earned by the Sales Engineer or received by the Company) were not subjected to the 25% withholding.

On April 4, 1961 Neff etc. filed a separate suit against the present plaintiffs, another party, and another Company, in the same Court, for alleged damages for alleged disloyal and unfaithful conspiratorial activities. It moved for consolidation thereof with the present plaintiffs' cases. The Court denied the motion.

On April 26, 1961 each of the plaintiffs filed Bills of Particulars, verified by oath. These incorporated summaries of the respective amounts allegedly due each of the plaintiffs. Each claimed the sums set opposite their names below:

Stanley Evaskus	$ 9,159.77
Philip Atwood	13,384.67
Paul Morrow	10,037.65
Frank Jarecki	6,565.78
Charles Heckel.	7,611.09

On May 2, 1961 the defendant by its unverified answers to the complaints admitted owing each of the following plaintiffs (not including Heckel to whom it denied owing anything) the following sums:

Stanley Evaskus.	$ 6,259.42
Philip Atwood	7,958.80
Paul Morrow	1,955.88
Frank Jarecki	3,129.74

On July 21, 1961, on the plaintiffs' motions for summary judgments for the amounts admitted to be due, the Trial Court found that they were entitled to judgments in the several amounts, but there was no actual entry of those several amounts as judgments, the Court specifically ordering that "the entry of said judgment be postponed until further order", and that the cause proceed as to the balances alleged to be due the plaintiffs.

On July 28, 1961 the plaintiffs, pursuant to Supreme Court Rule 18, filed and served a motion for admission by the defendant of the genuineness of the summaries of commissions dated March 29, 1961, above referred to, and of the truth of the same. The defendant did not respond thereto within the particular time stated in the Rule, but on September 8th, prior to trial, moved for leave to reply to that motion and to submit (revised) summaries of commissions dated August 16, 1961 correcting the error, if it be an error, in the summaries of March 29, 1961. The plaintiffs had been furnished with the information in the August 16th summaries. Before trial the Court denied that motion of the defendant. At the trial, however, the Court allowed the introduction by the defendant of the applicable (revised) summaries of August 16, 1961 as to Morrow and Jarecki.

The defendant moved, September 8, 1961, for leave to file a counterclaim involving substantially the same allegations involved in its foregoing separate pending suit against the present plaintiffs, another party, and another corporation. The Court denied the motion.

At the trial, pursuant to leave, the defendant filed verified amended answers to the complaints, and affidavits in substance denying the items of indebtedness in the Bills of Particulars.

The Court proceeded to hear the cause and in its final orders entered December 1, 1961 found Paragraphs Ninth and Fourteenth of the employment contracts valid; that the plaintiff Stanley W. Evaskus was entitled to recover $8,237.59, which was inclusive of any sums included in a partial judgment order entered July 21, 1961, and that Evaskus take nothing on account of his claim to the extent of $1,155.49 for unearned commissions; that Philip F. Atwood was entitled to recover $11,748.93, that that was inclusive of any sum in any partial judgment order entered July 21, 1961, and that he take nothing on account of his claim to the extent of $1,968.59 for unearned commissions; that Paul W. Morrow was entitled to recover $2910.73, that that be inclusive of any amounts in a prior partial judgment order entered July 21, 1961, and that he take nothing on account of his claim to the extent of $7,128.26 for unearned commissions; that Frank P. Jarecki have and recover $4,183.11, that that sum was to include any sum in the partial judgment order entered July 21, 1961, and that he take nothing on account of his claim to the extent of $2501.17, which latter figure covered $551.74 of alleged unearned commissions and $1949.43 of commissions on the Marshall Steel Company order; and that the plaintiff Charles O. Heckel take nothing.

This appeal is prosecuted by the several plaintiffs to reverse the judgments entered December 1, 1961 with respect to the following sums which the orders did not allow them:

Stanley W. Evaskus	$1155.49
Philip F. Atwood	1968.59
Paul W. Morrow	7128.26
Frank P. Jarecki	2501.17
Charles O. Heckel	4973.55

The defendant, Neff, Kohlbusch & Bissell, Inc., cross appeals from the judgments entered in favor of the plaintiffs Evaskus, Atwood, Morrow, and Jarecki, respectively, of $8,237.59, $11,748.93, $2,910.73, and $4,183.11.

It is the plaintiffs' theory that (1) the defendant by its failure to file an affidavit specifically denying the items of indebtedness set forth in the plaintiffs' Bills of Particulars, which were verified by oath as required by Section 37 of the Civil Practice Act, admitted that the amounts claimed no longer remained open to question; (2) the defendant cannot be allowed to keep 25% of the commissions on orders credited to each of the respective plaintiffs on termination of their respective employment agreements under Paragraph Ninth of the contracts because it failed to assert and prove any expenses incurred by it in completing and servicing those particular orders, and any other construction would render this clause a penal provision and illegal and unenforceable; (3) the defendant cannot be allowed to keep all the commissions due the plaintiffs Morrow, Jarecki, and Heckel on unfilled orders as of the date of the termination of the employments of those respective plaintiffs, under Paragraph Fourteenth of the agreements, because that clause is a naked forfeiture provision, against public policy, and unenforceable as a matter of law; and (4) the defendant wrongfully kept fifty per cent, $1,949.43, of the amount admittedly due Frank Jarecki on the Marshall Steel Company orders, the entire commission was, under the terms of the contract, due and owing to Jarecki, and the alleged agreement of Jarecki to accept 50% of the amount due in settlement was without consideration and void.

It is the defendant's theory that (1) affidavits of denial of the items of indebtedness stated in the plaintiffs' Bills of Particulars were filed by it in accordance with Section 37(3) of the

Civil Practice Act; (2) even if no affidavits had been filed, the trial judge, under Section 37(3), would have had the discretion to excuse such affidavits since there was no prejudice to the plaintiffs; (3) Paragraph Ninth of the employment agreements is a valid contractual provision, which is to be construed as of the time of the making of the Employment Agreements, regardless of the evidence or lack thereof of the amount of expenses incurred by Neff, Kohlbusch & Bissell, Inc. for servicing orders after the termination of employment of the plaintiffs; (4) Paragraph Fourteenth of the employment agreements of Morrow, Jarecki, and Heckel is a valid option clause, which is reasonable, and is to be construed in the light of the circumstances surrounding the parties at the time of their agreements; (5) the plaintiff Jarecki has no cause to complain of commissions received on the Marshall Steel Co. - Mattison Machine Works orders, where Neff etc. received only 1/2 of its normal commission, because Jarecki agreed to receive less and the consideration for his agreement was the forbearance of Neff etc. in not declaring that account a house account, under Paragraph Third, and in not terminating Jarecki's employment, under Paragraph Eleven of his agreement; (6) in arriving at the amounts of the four money judgments the Court did not follow Paragraphs Seventh 1A and Ninth as to what are "commissions - - - not earned" on the date of termination from which 25% was to be withheld; (7) the post-judgment actions of Messrs. Evaskus, Atwood, Morrow, and Jarecki in (a) obtaining the issuance and service of writs of execution and (b) instituting garnishment proceedings in order to make available, immediately, funds to cover their money judgments, and (c) the actions of Messrs. Evaskus, Atwood and Jarecki in actually collecting such judgments and executing satisfactions of judgments, estops them from prosecuting their appeals; (8) the trial court abused its discretion in

(a) not entering an order of consolidation of the five cases of the plaintiffs with the other separate case of Neff, Kohlbusch & Bissell, Inc. against them, another party, and another corporation for damages resulting from the alleged disloyal and unfaithful conspiratorial activities of the present plaintiffs in taking clients and customers of Neff, Kohlbusch & Bissell, Inc. and leaving, as a group, the employ of Neff, etc., and starting as a group, a competing business, and in (b) not granting leave to Neff, etc. to file either a counterclaim based on damages allegedly resulting from the alleged disloyal and unfaithful conspiratorial activities of the present plaintiffs or for damages resulting from the plaintiffs' alleged breaches of the contracts on which they are suing, and (9) in arriving at the amount of the Atwood judgment the trial judge did not follow the provisions of Paragraphs Second and Seventh 1A of the Atwood employment agreement as to whom to credit the U. S. Gypsum - U. S. Tool order and, accordingly, awarded, erroneously, the commission on this order on an unproven quantum meruit basis, in spite of the testimony that the order was received by Neff, etc. after the resignation of Atwood and that the order was changed to a different machine as the result of later further sales efforts of Neff, etc.

The defendant Neff, Kohlbusch & Bissell, Inc. is a manufacturer's sales representative for various machine tool manufacturers. The plaintiffs were employed by it as Sales Engineers under separate written employment agreements, the agreements being identical except the Morrow, Jarecki, and Heckel agreements had the additional Paragraph Fourteenth, previously indicated, which was not in the other agreements. The defendant's sales territory is primarily the Chicagoland machine tool area, in the northern counties of Illinois and Indiana, and also in the States of Indiana, Wisconsin, Iowa

and Minnesota. Machine tools are tools that are manufactured and sold to various other manufacturers, for use by such manufacturing customers in the manufacture of other products. Machine tools include various types of grinding, milling, punch press and similar types of machines used for metal working, primarily. Salesmen of machine tools are required to have considerable technical knowledge of the function, capabilities, and characteristics of such tools. Ordinarily, they must go through an apprenticeship of learning about the products which they sell. Accordingly, it has been customary for Neff, etc. to send its salesmen for training to the plants of some of the manufacturers it represents. Neff, etc. furnished its salesmen with a sales book, giving them each a list of 200 to 300 customers. The book contained secret and confidential trade information, including the names of the customers, the personnel who are responsible for purchasing and ordering machine tools, and the types of machine tools that that company ordinarily purchases. These sales books, and the customers' lists in them, had been built up by Neff, etc. over a period of 40 years. The salesmen are in direct and frequent contact with the manufacturers of machine tools and the customers to whom they were sold. The defendant has no record of the particular costs of servicing the accounts, or "completing and servicing such orders" in the contemplation of Paragraph Ninth of the employment agreements.

The services of the five plaintiffs to Neff, etc. ended on July 31, 1959, by their resignations or not returning to work. Prior to their departure from Neff, etc. the plaintiffs and Jack Miller, another employee, set up a competing business called Select Machine Sales, Inc., representing machine tool builders, some of whom they had solicited to switch from Neff, etc., and had commenced calling on

and obtaining orders from customers on some of whom they had called while acting as Sales Engineers for Neff, etc.

As of July 31, 1959 the plaintiffs Evaskus, Atwood, Morrow, and Jarecki each had certain earned commission money on the defendant's books and there were certain commissions not yet earned. As to Atwood, there is also the matter of the U. S. Gypsum - U. S. Tool order commissions, - he had been attempting to obtain the order for some time; on the date of his termination of employment a telephone order was obtained, a purchase order number assigned, and the machine tool manufacturer informed by telephone and letter; the written order came into existence several days later; other salesmen later worked on it, and later a new order was placed and accepted for a larger, more expensive machine of the same type. As a preliminary finding the Court below allowed those commissions. As to Jarecki, there is also the matter of the Marshall Steel Co. - Mattison Machine Works orders, - for reasons beyond its control Neff etc. received only 1/2 its normal commission thereon, and Jarecki agreed to take 1/2 of his normal part of the commission (20% instead of 40%). As a preliminary finding the Court below denied any additional commissions. As to the plaintiff Heckel, there is the matter of a possible overdraw in his account with Neff, etc., and a possible deficit balance because of that and the application of Paragraph Fourteenth; also, as to Heckel, he and one Kallin, a former employee of Neff, etc., had an agreement at first to pool and divide their earnings, or split their commissions, there was a question whether there was a later agreement supplementing or superseding that for them to account to each other for any overages, or for the defendant to take care of any extra Heckel might be entitled to, but the Court found Heckel could not look to Neff, etc. for any commissions he

may have had in the pool in excess of those of Kallin; also, as to Heckel, there was the matter of certain commissions on certain Deere and Co. orders, some of which orders came into being after termination of his employment, but on which Heckel had oral orders before then, and which commissions were paid to a Mr. Blank, Heckel's successor, and on some of which Neff, etc. received no commission. As a preliminary finding the Court below allowed commissions on the disputed orders, but denied Heckel's claims as to the splitting commissions arrangement with Kallin and the effects thereof.

Evaskus, Atwood, Morrow and Jarecki obtained executions and instituted garnishment proceedings seeking to collect their judgments. The defendant deposited with the Clerk of the Court the total amount of the money judgments, pursuant to a motion and order thereon, the order directing the delivery thereof to the plaintiffs upon their furnishing satisfactions of judgments, and Evaskus, Atwood, and Jarecki then executed on January 26, 1962 satisfactions of their judgments and withdrew and accepted the amounts of money representing their respective judgments. Morrow did not execute a satisfaction of his judgment and did not withdraw and accept the amount of money on deposit representing his judgment. The plaintiffs' notices of appeal herein were dated and filed February 2, 1962.

The voluntary receipt by a party of money directed to be paid him by a decree or judgment necessarily operates as a release of errors, if any; by accepting such he acquiesces in and approves the decree or judgment; a party ought not to receive the benefit of a decree or judgment and then complain that it is erroneous; if dissatisfied the party should abstain from doing any act which may change the situation or impair the rights of the parties in the

event the decree or judgment be reversed; if the decree or judgment be later reversed the parties ought to be restored, and be in a position to be restored, to the position they occupied before it was rendered; their rights should be reciprocal: THOMAS, adm. etc. NECUS, et al. (1845) 2 Gilman 700. Where a decree directs the payment of a certain sum to a party, which sum is brought in and deposited with the Clerk, and which sum is later accepted by the party directed to receive it, that voluntary acceptance operates as a release of errors; a party who voluntarily receives the benefit of a decree, or judgment, shall not be allowed afterwards to allege it is erroneous; the errors, if any, are released by his voluntary act; when thus waived, he cannot again assert them: MORGAN v. LADD et al. (1845) 2 Gilman 414. Even though the decree or judgment may allow the party less than he is entitled to, still, so far as it directs payment of any sum to him, to that extent it was beneficial, and the party cannot avail himself of that part of a decree or judgment which is favorable to him, and secure its fruits, and then seek to reverse in a Court of review such parts as militate against him; if a decree or judgment were to be reversed the parties should be placed in status quo; it would be manifestly unjust to permit a party to take all the money a decree or judgment gives him and then speculate upon the possibility of getting more by an appeal or writ of error; a party cannot voluntarily accept money directed to be paid him by a decree or judgment and then ask a reversal on the grounds it did not give him enough; his voluntary acceptance is a ratification: HOLT et al. v. REES et al. (1867) 46 Ill. 181. Where a party voluntarily accepts the benefit of a decree or judgment he cannot afterwards prosecute error to reverse it, -- such operates, in a proper case, as an estoppel, and may be treated as a release of errors, - and if the case is within the principle of

the precedents in that respect then even though the manner in which the issue is presented to the reviewing court is not, according to the ancient forms, a plea of release of errors, under the then procedure, it is a sufficient bar to the writ of error, or appeal: CORWIN et al. v. SHOUP (1875) 76 Ill. 246. Any errors which may occur in the rendition of a decree or judgment may be released by the party against whom they are made, and if released, the fact they were obvious or the decree or judgment clearly erroneous would be immaterial; a party is bound, if he accepts the benefit of a decree or judgment to accept the whole decree or judgment, and his voluntary receipt of that which is in his favor (even though an unquestioned part) operates as a release of errors of that part which is against his interest: GRIDLEY et al. v. WOOD (1922) 305 Ill. 376. Whether or not the decree or judgment is severable the plaintiff in error, or appellant, having availed himself of its benefits must be held to have accepted the unfavorable as well as the favorable rulings: KELLNER et al. v. SCHMIDT et al. (1925) 237 Ill. App. 428. Where a plaintiff voluntarily accepts the amount awarded him by a judgment he is precluded from further litigating his claim by an appeal: TRIMBLE v. FIRST NATIONAL BANK etc. (1901) 101 Ill. App. 75. See also: TRAPP admr. etc. v. OFF (1901) 194 Ill. 287; LAUGHER et al. v. GLOS (1916) 276 Ill. 342; SCOTT et al. v. SCOTT et al. (1922) 304 Ill. 267.

As to the appeals of the plaintiffs Evaskus, Atwood, and Jarecki, therefore, their voluntary acceptance and receipt of the moneys respectively directed to be paid them by each respective judgment necessarily operates as a release of errors, if any, by them respectively. By voluntarily accepting such they respectively acquiesced in and approved the respective judgments. They cannot voluntarily receive the benefit of their respective judgments and then complain

that they are erroneous. Their voluntary acceptance of their moneys and satisfactions of their judgments might materially change the situation or impair the rights of the defendant in the event the judgments were reversed. Even though the judgments may respectively have allowed them less, if they did, then they respectively may have been entitled to, yet, so far as the judgments direct payment of any sums to them, to those extents they are respectively beneficial, and they cannot voluntarily avail themselves of those parts of the respective judgments which are favorable and then seek to reverse that part as militates against them. They cannot voluntarily accept moneys directed to be paid them by the judgments and then ask a reversal on the grounds that the judgments did not give them enough. They have ratified the same. If they accept the benefit of the respective judgments they are bound to accept the whole of each judgment, and their voluntary receipt of that which is in their favor (even though it were an unquestioned part, if it were) operates as a release of errors of that part which is against their interests. Whether or not the judgments be severable they have accepted the unfavorable as well as the favorable rulings. They are precluded from further litigating their claims by their appeals. The appeals as to those plaintiffs being within the principle of the foregoing applicable precedents in this respect, then though the manner in which the issue is presented is not a plea of release of errors, or, under the present practice, a motion in lieu thereof, it is a sufficient bar to their appeals. That this might have been raised by a motion by the defendant in lieu of a plea of release of errors, CH. 110 ILL. REV. STATS., (1961) par. 86.1, does not preclude its being considered, under the circumstances, all the relevant facts and circumstances being presented by the record and its not being based on any matter that does not appear of record. The plaintiffs refer us to no Illinois cases on

this, and, in particular, to no Illinois cases in support of their contentions that those plaintiffs by accepting that part of a judgment which they describe as "uncontroverted" are not barred from asking a reviewing Court to grant them the part which they describe as "controverted", that the judgments are "severable", and can be "fragmented for appeal purposes". The applicable authorities appear to be to the contrary. So far as the appeals of the plaintiffs Evaskus, Atwood, and Jarecki are concerned the record indicates that only moot questions or abstract propositions are involved.

As to the appeal of the plaintiff Morrow, since he did not execute and file a satisfaction of judgment or accept payment, although the money representing his judgment is on deposit with the Clerk, we do not believe his actions in simply obtaining issuance of an execution and instituting garnishment, without more, and obtaining no payment, constitute a release of errors or a bar against his prosecuting his appeal. The defendant refers us to no Illinois case holding otherwise, and SPRINGER v. MERCHANTS NATIONAL BANK (1896) 67 Ill. App. 317 indicates that simply the payment by a defendant into Court of the amount of a judgment against him, for the use of the plaintiff, does not in itself constitute an acceptance thereof by the plaintiff.

With regard, then, to the appeals of the plaintiffs Morrow and Heckel, -

Section 37(3) of the Civil Practice Act, CH. 110 ILL. REV. STATS. 1961, par. 37(3), as to bills of particulars, which is involved in the plaintiffs' first point, provides that:

> "(3) If a bill of particulars, in an action based on a contract, contains the statement of items of indebtedness and is verified by oath, the items thereof are admitted except in so far as the opposite party files an affidavit specifically denying them, and as to each item denied states the facts upon which the denial is based, unless the affidavit is excused by the court."

The defendant had requested bills of particulars in November, 1960. The plaintiffs filed their bills of particulars April 26, 1961. At the trial, in September, 1961, pursuant to leave, the defendant filed affidavits in substance denying the items of indebtedness in the bills of particulars. Meanwhile, by its answers of May 2, 1961 to the complaints denying owing the plaintiff Heckel anything, instead of the $7611.09 claimed in his bill of particulars, and admitting owing Morrow only $1955.88, not the $10,037.65 claimed in his bill of particulars, and by its revised summaries of commissions of August 16, 1961 as to Morrow, furnished the plaintiffs prior to trial, the plaintiffs Morrow and Heckel were made aware of the defendant's position as to their claims. And then at the trial, pursuant to leave, the defendant filed verified amended answers to the complaints. Under the circumstances it would seem the defendant did in fact file an affidavit specifically denying the items of indebtedness set forth in the bills of particulars, within the meaning of Section 37(3). That section does not require the filing of such affidavit within any particular time. Its earlier filing evidently was, in effect, excused by the Court by granting leave to file affidavits at the trial, - the Court had authority to excuse the filing altogether. There was no abuse of judicial discretion, considering all the facts and circumstances and the state of the record, including the time the plaintiffs took to file their bills of particulars to begin with, and that the plaintiffs were on notice long prior to trial of the defendant's position as to their claims and could not have been surprised or prejudiced. It cannot be said the items of indebtedness claimed in the bills of particulars are admitted by the defendant. O'BRIEN v. BROWN (1949) 403 Ill. 183, the only case referred to by the plaintiffs on this, is not appositeto the facts, circumstances, and record here presented.

The plaintiffs' second and third points require consideration particularly of Paragraphs Seventh 1A, Ninth, and Fourteenth of the employment contracts of the plaintiffs Morrow and Heckel. The relation of employer and employee is purely voluntary and rests on the contract of the parties; like every other contract, a contract of employment arises out of the meeting of the minds of the parties, and mutuality of obligation and sufficiency of consideration are essential; a contract of employment may contain such terms and conditions as the parties see fit to make provided they are not illegal or unreasonable or in violation of valid statutory provisions; contracts of employment are subject to the same rules of construction as other contracts; the main object in construing such a contract is the intention of the parties, and effect is to be given to that intention whenever it can be done without doing violence to the obvious meaning of the language used; a contract of employment is terminated where the employee refuses to serve or voluntarily abandons the service, whether with or without justifiable cause; where the terms of the contract fix the employee's compensation the contract determines the amount of his recovery, - if such is in the form of commissions the amount receivable and the method of computation are dependent on the terms of the contract; an employee's right to commissions may be conditioned on the performance by him or the employer of some specific act prescribed, or on the existence of a particular situation, in which case there can be no recovery except on performance or fulfillment of the condition; provisions for deductions from an employee's wages are enforceable where they are reasonable: 17 Ill. Law and Pract. pp. 364, 373, 375, 376, 389, 413, 414, 415, 418. See: ELDRIDGE v. ROWE (1845) 2 Gilman 91. Words in a written contract are to be understood in their plain and literal meaning, although all the consequences may not have been in

the contemplation of the parties, - every clause and every word should, when possible, have assigned to it some meaning, - it is not to be presumed, when avoidable, that the parties have employed language idly: DELAMATER v. KEARNS (1890) 35 Ill. App. 634. Contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of limiting or extending their operation: WEILL et al. v. CENTRALIA SERVICE etc. CO. et al. (1943) 320 Ill. App. 397.

As a general rule, any obligation entered into voluntarily and for a good consideration, is valid at common law, unless it contravenes the policy of the law, or is repugnant to some provision of an applicable statute: PRITCHETT et al. v. PEOPLE etc. (1844) 1 Gilman 525. There is no precise definition of public policy, and consequently no absolute rule by which a contract can be measured to determine whether or not it is contrary to public policy; each case must be determined according to its own peculiar circumstances; the public policy of the state is to be found in its constitution, its statutes, and, if they be silent, then in its judicial decisions; courts will look to no other sources to determine the public policy of the State: ZEIGLER v. ILL. TRUST etc. BANK, exec. (1910) 245 Ill. 180; PEOPLE ex rel. etc. v. EMMERSON, etc. (1922) 302 Ill. 300.

The plaintiffs Morrow's and Heckel's rights, or lack of rights, of recovery are bottomed on their employment contracts, and their rights, or lack of rights, to commissions must be derived from the contracts themselves. Paragraphs Seventh 1A, Ninth, and Fourteenth are to be considered and construed together as necessarily interrelated, interdependent, component parts of an entire contract.

To begin with, the plaintiffs sales engineers were to receive "a commission of forty per cent (40%) of the gross commission received by the company upon all orders procured by and credited to the sales engineer", and "a commission shall not be considered earned by the sales engineer, nor received by the company, until the company shall have received payment in cash of such commission", - Paragraph Seventh 1A, - all subject to subsequent adjustment under another paragraph. The plaintiffs, at the outset, were entitled only to a portion, 40%, of only the gross commission received by the company, and until the company received payment in cash of its gross commission no commission was earned by the plaintiffs or received by the company.

Upon termination of the agreements, - and there is no question but that they were terminated July 31, 1959, - "the company shall have the right to withhold from the sales engineer twenty-five per cent (25%) of all commissions which may become due and payable - - - but which commissions are not earned as herein set forth upon the date of such termination, to pay the expenses of the company of completing and servicing such orders, not applying in case of total disability or death", - Paragraph Ninth. The only thing referred to therein is a portion, 25%, "of all commissions which may become due and payable - - but which commissions are not earned as herein set forth upon the date of such termination". Those would be situations where, under Seventh 1A, the company had not at that time received payment in cash of its gross commission. In those situations, at that time, no commission was then earned by the plaintiffs, no gross commission had at that time been received by the company, and there was nothing at that time of which the plaintiffs were entitled to 40%. The plaintiffs at that time in those situations were not entitled to any commissions, they

had no vested property rights therein, their rights were not yet ripened or accrued, but were prospective in character. Their rights to commissions were conditioned on the existence of a particular situation, - the receipt of payment by the company in cash of its gross commission, - that was an essential part or basis of the method of computation of commissions, - and at the date of termination of the agreements in those situations where the company had not at that time received payment in cash of its gross commission then an essential condition to their rights was not fulfilled at that time and under those circumstances. Hence they had no vested rights then in those cases.

Under Paragraph Ninth the company on termination may withhold not all, but only 25%, of such commissions which may become due and payable but which are not then earned (and hence not then due and payable), to pay the expenses of the company of completing and servicing such orders. Such a provision, under the circumstances here presented, as to a subject matter to which the plaintiffs at that time in those situations were not entitled, in which they then had no vested property rights, in which their rights were not yet ripened or accrued, but prospective only, does not seem unreasonable or illegal. "Withhold" means to hold back, to check, restrain, to keep from action, to desist or refrain from granting, giving, allowing, or the like, to keep back, to keep, maintain, or retain: WEBSTER'S NEW INTERNATIONAL DICTIONARY. The provision is not to "withhold until" a certain eventuality and, possibly, then pay the same, (as it was in a statute involved in one of the cases the plaintiffs cite). Nor is it to "withhold temporarily". The language is just plain "withhold", followed in a later clause by "to pay the expenses of the company of completing and servicing such orders". There is no provision that after paying such expenses the company shall account to, and pay any excess, if there be any, to the plaintiffs. "To pay the expenses of the company of completing and

servicing such orders" is simply a recital of a reason for the prior parts of Paragraph Ninth, but is not the imposition of an obligation on the company. It already had the obligation to pay such expenses, regardless of that phrase in Paragraph Ninth.

The "expenses of the company of completing and servicing such orders" might be, and evidently are here, difficult, if not impossible, to pinpoint, - the defendant has no record of the particular costs of "servicing" such accounts, - and the period of time concerned for that might well be uncertain, - but it has been held that "servicing the accounts" has a common meaning understood not only as a sales term, but by the public generally with relation to those services which a salesman (the defendant) of mechanical appliances is called upon to perform: HEUVELMAN v. TRIPLETT ELECTRICAL INST. CO. (1959) 23 Ill. App. (2) 231. That the defendant had a real function to perform in "completing and servicing such orders" seems clear, and that it would have had, necessarily, some expenses in doing so is a reasonable hypothesis, - indeed, in their briefs here the plaintiffs do not deny that such expenses can be incurred. The plaintiffs and defendant must have in good faith so considered the matter or they would not have put that phraseology in Paragraph Ninth as a recital or expression of a reason therefor, - they all evidently knew or assumed there would be some, though perhaps hard to define, expenses of that nature. It cannot be disregarded as idle words. And the very fact such expenses are difficult, if not impossible, to pinpoint, and the very indefiniteness of the period of time that might be concerned in that respect, may well have been the reasons why the parties determined upon a portion, - perhaps an arbitrary portion, - 25%, of commissions not earned, to pay, or in lieu of, the expenses of the company, as a reasonably fair pro-

vision, under the circumstances, in that respect, binding alike for this purpose on the defendant as well as the plaintiffs and whether the actual expenses, if spelled out, might in particular instances be more or less than such, and regardless of how long a time might be involved, which portion or agreed amount the defendant might permanently withhold, and which would once and for all close the books on that matter between the parties. "Withhold" used in a certain statute in a quite different way may, of course, sometimes mean a temporary suspension, as another case cited by the plaintiffs holds, but such is not this case.

It was not wholly beyond the control of these plaintiffs themselves to here avoid, or much alleviate, the impact of Paragraph Ninth, in fact, since the termination here was voluntary on their part it was in large measure within their control, by simply timing the termination to occur at a date when they had pending no, or few, "commissions - - not earned", - which apparently could have been readily ascertained by reference to their own records or those of the company or conferring with the defendant's bookkeeper.

Somewhat similar considerations are in part applicable to Paragraph Fourteenth. Again, it must be remembered that the plaintiffs, at the outset, were entitled only to a portion, 40%, of only the gross commission received by the company, and until the company received payment in cash of its gross commission, no commission was earned by the plaintiffs or received by the company, - Paragraph Seventh 1A.

Under Paragraph Fourteenth, "In the event the Sales Engineer leaves the employ of the company and enters into a business which competes with the company", - and there is no question but that the plaintiffs Morrow and Heckel did that, - "the Sales Engineer

will forfeit all commissions on unfilled orders as of the date of his termination of employment." The only thing referred to therein is "all commissions on unfilled orders as of the date of his termination of employment." Those would be situations where the orders had not even yet been filled and where, obviously, under Seventh 1A, the company had not at that time received payment in cash of its gross commission. In those situations, just as in the above application of Paragraph Ninth, at that time, no commission was then earned by the plaintiffs, no gross commission had at that time been received by the company, and there was nothing at that time of which the plaintiffs were entitled to 40%. The plaintiffs at that time in those situations were not entitled to any commissions, they had no vested property rights therein, their rights were not yet ripened or accrued, but were prospective in character. As in the case of Paragraph Ninth, their rights to commissions were conditioned on the existence of a particular situation, and at the date of their termination of employment under Paragraph Fourteenth an essential condition to their rights was not fulfilled at that time as to such unfilled orders. Hence, they had no vested rights then in those cases. Such a provision as Paragraph Fourteenth as to a subject matter to which the plaintiffs at that time in those situations were not entitled, in which they then had no vested property rights, in which their rights were not yet ripened or accrued, but prospective only, does not seem unreasonable or illegal. The plaintiffs' leaving the employ of the company and entering into a business which competes with the company were here contemporaneous acts, so no question is presently presented as to the reasonableness in point of time of Paragraph Fourteenth had there been some time spread between those

events, and since they did so in the territory now covered by the company no question is presently presented as to the reasonableness in point of area of the paragraph. The only right the plaintiffs might ultimately acquire to commissions on unfilled orders was such as they might acquire by compliance with the contracts and as of the date of their termination of employment under Paragraph Fourteenth the contracts were not yet complied with as to those situations. The plaintiffs shall not, under those circumstances, receive commissions on unfilled orders, - that is what the parties meant, - that was just a part and parcel of the method of computation thereof and was consistent with Paragraph Seventh 1A. Perhaps they could have used more accurately descriptive language than "forfeit", but their intentions were clear, - and the presence or absence of that word, or the somewhat similar words "penalty" or "penal sum" is not controlling in determining the real nature of the provision, - the whole contract, the subject matter dealt with, and the situation of the parties must be considered: Cf. MCCULLOUGH v. MOORE et al. (1904) 111 Ill. App. 545. It cannot be presumed the plaintiffs and defendants deliberately inserted in their solemn contract an idle, invalid, unenforceable provision for a technical forfeiture or penalty, when the provision is subject to a more reasonable interpretation, - they are all presumed to have known the law and not to have done something deliberately contrary thereto.

Again, since the plaintiffs' leaving the employ of the company and entering into a business which competes with the company was voluntary, it was in large measure within their control to here avoid, or much alleviate, the impact of Paragraph Fourteenth, by simply timing their leaving to occur at a date when they had pending no, or few, "unfilled orders", which could apparently have been

readily ascertained by reference to their own records or those of the company or conferring with the defendant's bookkeeper.

Such, we believe, were the intentions of the parties as to Paragraphs Seventh 1A, Ninth, and Fourteenth. They were all sui juris, not unsophisticated in business affairs, the defendant had been in business many years, the plaintiffs, generally, were long time employees, and there is no evidence of any overreaching, or coercion. And the plaintiffs refer us to no provision of the constitution, or of any statute, and to no Illinois judicial decision determining such to be contrary to public policy. BAUER et al. v. SAWYER et al. (1956) 8 Ill. (2) 351, referred to by the plaintiffs, does not hold provisions like Paragraphs Ninth and Fourteenth to be contrary to public policy under the circumstances here presented. See: MASDEN v. TRAVELERS INS. CO. (1931) 52 F (2) 75, C. C. A. 8th; REPSOLD v. N. Y. LIFE INS. CO. (1959) 216 F (2) 479, C. A. 7th; BARR v. SUN LIFE ASSUR. CO. etc. (1941) 200 So. 240, Florida; SEIBEL v. COMMONWEALTH LIFE INS. CO. (1922) 190 N.W. 173, Iowa.

The plaintiffs' fourth point, and the defendant's fifth point, concerned with a part of the claim of the plaintiff Jarecki, need not be considered under the circumstances.

The defendant's sixth point that in arriving at the amounts of the Evaskus, Atwood, Morrow, and Jarecki judgments the Court did not follow Paragraphs Seventh 1A and Ninth as to what are "commissions ---- not earned" on the date of termination from which 25% was to be withheld, relates to the plaintiffs' appeals, but in view of our determination hereinbefore it presently concerns only the Morrow appeal, as to whom the judgment was that he recover $2910.73 and that he take nothing as to $7128.26 for unearned commissions. The trial court heard and weighed all the evidence, much of it furnished from

the defendant's books and records, drew reasonable inferences therefrom, and applied Paragraphs Seventh 1A and Ninth, and under the circumstances we are not disposed to say the Court's determinations of the facts, its arithmetical computations, and its inferences from the evidence are contrary to the manifest weight of the evidence.

As to the cross appeal of the defendant, -

Section 51 of the Civil Practice Act, CH. 110 ILL. REV. STATS., 1961, par. 51 provides that " * * * actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right".

Section 38 of the same act, CH. 110 ILL. REV. STATS., 1961, par. 38 provides that " * * * (1) * * any demand by one or more defendants against one or more plaintiffs, * * * may be pleaded as a cross demand in any action, and when so pleaded shall be called a counterclaim. * * * (2) The counterclaim shall be a part of the answer, and shall be designated as a counterclaim. * * * ".

The plaintiffs' suits here were filed in October and November, 1960. The defendant's separate suit against them and others was not filed in the same court until in April, 1961. A motion for consolidation was denied. The defendant's answers here were filed in May, 1961. The defendant did not move until in September, 1961 for leave to file a counterclaim involving in substance the same things concerned in its still pending separate suit, which it made no motion to dismiss, and that was denied.

The granting or refusing of a motion to consolidate rests within the Court's discretion: BLACKHAWK MOTOR TRANSIT CO. v. I.C.C. et al. (1943) 383 Ill. 57, - and there was here no abuse of that judicial discretion.

It is within the discretion of the Court to allow, or deny, the filing of a counterclaim subsequent to the filing of the answer: Cf. PEOPLE ex rel. etc. v. MARX etc. (1939) 299 Ill. App. 284, and there was here no abuse of that judicial discretion.

In regard to the amount of the plaintiff Atwood's judgment, and the U. S. Gypsum - U. S. Tool Order, - as to that particular limited phase of that subject, a salesman who is the procuring cause of a sale is, in general, entitled to a commission, subject to all the other terms of his employment contract, notwithstanding the fact the sale is consummated by the principal personally or through another agent, the usual case of that type being an agent who has had some kind of direct personal contact with a prospective customer: HEUVELMAN etc. v. TRIPLETT ELECTRICAL INST. CO. (1959) 23 Ill. App. (2) 231, and a person selling on a commission basis is, generally, entitled to a commission, subject to all the other terms of his employment contract, when a sale is made, irrespective of when shipment takes place and even if shipment is after his term of employment: ATKINSON v. NEW BRITAIN MACH. CO. (1946) 154 F (2) 895, C.C.A. 7th. We do not believe the Court's determinations of the facts and its drawing of reasonable inference from the evidence, all of which it heard and weighed, are contrary to the manifest weight of the evidence in this respect.

Accordingly, the appeals of the plaintiffs Stanley W. Evaskus, Philip F. Atwood, and Frank P. Jarecki are dismissed; on the appeals of the plaintiffs Paul W. Morrow and Charles O. Heckel the respective judgments as to them are affirmed; and on the cross appeal of the defendant Neff, Kohlbusch and Bissell, Inc.

the respective judgments as to the plaintiffs Stanley W. Evaskus, Philip F. Atwood, Paul W. Morrow, and Frank P. Jarecki are affirmed.

Appeals of the plaintiffs Stanley W. Evaskus, Philip F. Atwood, and Frank P. Jarecki DISMISSED.

On the appeals of the plaintiffs Paul W. Morrow and Charles O. Heckel, respective judgments as to them AFFIRMED.

On the cross appeal of the defendant Neff, Kohlbusch and Bissell, Inc., respective judgments as to the plaintiffs Stanley W. Evaskus, Philip F. Atwood, Paul W. Morrow, and Frank P. Jarecki AFFIRMED.

Wright, P.J. Concurs

Herbert, J. Concurs.

> "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his client. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, or course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways--aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. . . . The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."

[3] Whether our Supreme Court in the Stimpert case has encroached upon and modified the rule laid down in the Hickman case or is not in accord with the conclusion reached by others as to what the rule is in Illinois is a matter with which we have no concern. Our Supreme Court can in further decisions upon this highly controversial question set out definitely how far an attorney can go in requiring the opposing counsel to produce materials which he has prepared in preparation for trial. The case before us falls squarely within the decision in the Stimpert case.

The judgment order of the Superior Court of Cook County is affirmed.

Affirmed.

Dempsey, P.J., and Schwartz, J., concur.

Publish in full.

RESERVE BOOK

Illinois Unpublished Opinion

#40

88296

This reserve book is NOT transferable and must NOT be taken from the library ~~except when charged out for overnight use~~.

You are responsible for the return of this book.

DATE	NAME		
7/1/80	V Olson	222	9350
7-28-80	Rodick	332 7760	
8-26-80	C E Brega d	732 1855	
12/23/80	Dennis Ramirez	222-6900	
	M. Gore	332 6294	
1-26-81	S Brownlie	448-0656	
2-3-81	[illegible]	222-8350	
9-24	Spring	372 1177	
9/24	K Rasmussen	386 7760	
	Simpson	417 357	

88296.